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No. 91-1945

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

TRIANGLE INDUSTRIES, INC.,
a/k/a ANC HOLDINGS, INC.;
TRIANGLE PWC, INC.,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE CO.,
NEW JERSEY PROPERTY/LIABILITY INSURANCE
GUARANTY ASSOCIATION, on behalf of
IDEAL MUTUAL INSURANCE COMPANY, in liquidation,

Respondents.

SUPPLEMENTAL BRIEF AND APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

Petitioners, Triangle Industries, Inc. and Triangle PWC, Inc. (collectively referred to as "Triangle" or "Petitioners"), submit this Supplemental Brief and Appendix to invite this Court's attention to the recent decision of the Supreme Court of Appeals of West Virginia in *Joy Technologies, Inc. v. Liberty Mutual Insurance Company,* Docket No. 88-C-96-F (June 11, 1992), attached as an Appendix hereto at 1-b, in which that Court, in reliance upon the statements made by Liberty Mutual Insurance Company ("Liberty Mutual") in hearings conducted before the Commissioner of Insurance of the State of West Virginia, found the "sudden and accidental" exception language in the pollution exclusion clause of a Comprehensive General Liability ("CGL") policy to mean "unexpected and unintended," with regard to the pollution "damage," rather than the pollution "release." *Id.* Hence, where the pollution damage was unexpected and unintended, the sudden and accidental exception to the pollution exclusion clause operates to provide coverage.

In finding coverage for the insured in the *Joy Technologies* case, the Supreme Court of Appeals of West Virginia adopted one of the arguments advanced by Triangle in *Liberty Mutual Insurance Company v. Triangle Industries, Inc.,* ____ W. Va. ____, 390 S.E.2d 562 (1990)[1], as well as the findings of the Commissioner of Insurance for the State of West Virginia. 12-b through 14-b.

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1. The same argument which the Supreme Court of Appeals of West Virginia adopted in *Joy Technologies* was advanced by Triangle when it was before that court. The court declined to reach the issue, however, because it determined that New Jersey law governed the interpretation of the relevant insurance policy language.

Thus, the Supreme Court of Appeals of West Virginia has held in *Joy Technologies* that Liberty Mutual, a party both to this case and *Morton International Inc. v. General Accident Insurance Co. of America,* Docket No. 34,341 (certif. granted, March 2, 1992), currently pending before the Supreme Court of New Jersey, is bound by its own interpretation of the policy language in dispute in this case, an issue which was fully and fairly adjudicated before the Commissioner of Insurance of the State of West Virginia and again before the Supreme Court of Appeals of West Virginia in *Joy Technologies.* Accordingly, the doctrine of offensive collateral estoppel, announced by this Court in *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), applies to bar Liberty Mutual from relitigating the policy language at issue in this case in any other adjudication in which it is a party.

ARGUMENT

POINT 1

LIBERTY MUTUAL IS COLLATERALLY ESTOPPED BY THIS COURT'S DECISION IN *PARKLANE HOSIERY, CO. INC. v. SHORE* FROM RELITIGATING AN ISSUE WHICH WAS RESOLVED AGAINST IT BY THE DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA IN THE RECENT CASE OF *JOY TECHNOLOGIES, INC. v. LIBERTY MUTUAL INSURANCE COMPANY.*

The seminal case of *Parklane Hosiery Co. Inc. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), involved a successful attempt by Respondents, the stockholders of Parklane Hosiery Co. Inc. ("Parklane") to assert offensive collateral estoppel against Petitioner, Parklane, to bar it from relitigating the question of whether its proxy statement was materially false and misleading, an issue which this Court

determined to have been "fully and fairly" litigated in an earlier suit by the Securities Exchange Commission ("SEC") against Parklane, involving the same language in the proxy statement. *Parklane,* 439 U.S. at 323, 99 S.Ct. at 647, 58 L.Ed.2d at 553.[2]

The Court has broad discretion to determine when offensive collateral estoppel should be applied. *Parklane,* 439 U.S. at 322, 99 S.Ct. at 651, 58 L.Ed.2d at 553; *General Dynamics Corp. v. American Tel. & Tel. Co.,* 650 F.Supp. 1274, 1282 (N.D. Ill. 1986) *Certif. granted, amended, General Dynamics Corp. v. American Tel. & Tel. Co.,* 658 F.Supp. 417 (N.D. Ill. 1987). The underlying purpose of this doctrine is to avoid affording a litigant "*more than one* full and fair opportunity for judicial resolution of the same issue." *Parklane,* 439 U.S. at 328, 99 S.Ct. at 650, 58 L.Ed. 2d at 558 (emphasis added). In *Parklane,* this Court ultimately held that:

> Since [Parklane] received a "full and fair" opportunity to litigate their claims in the SEC action, the contemporary law of collateral estoppel leads inescapably to the conclusion that [Parklane is] collaterally estopped from relitigating the question of whether the proxy statement was materially false and misleading.

Parklane, 439 U.S. at 333, 99 S.Ct. at 652, 58 LE.D. 2d at 563.

The United States District Court for the Northern District of Illinois articulated a four-part test for determining whether the doctrine is applicable to a given situation:

> When a plaintiff seeks to offensively, collaterally estop a defendant from relitigating certain issues, the plaintiff must establish that[:] (1) the party against whom the estoppel is asserted was a party, to

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2. This Court granted *certiorari* in *Parklane* because of an inter-circuit conflict. *Id.* at 326, 649, 554.

> the prior litigation; (2) the issues were actually litigated and decided on the merits in the earlier suit; (3) the resolution of the particular issues was necessary to the court's judgment; and (4) the issues in the prior suit are identical to those raised in the subsequent suit.

General Dynamics, 650 F.Supp. at 1291, *citing Falconer v. Meehan,* 804 F.2d 72 (7th Cir. 1986); *Kunzelman v. Thompson,* 799 F.2d 1172, 1178 (7th Cir. 1986); *Garza v. Henderson,* 779 F.2d 390, 392-93 (7th Cir. 1985); and *County of Cook v. MidCon Corp.,* 773 F.2d 892, 898-99 (7th Cir. 1985).

Generally, in addition to reviewing the elements of a plaintiff's proofs described above, the court should consider "whether application of collateral estoppel would be *substantially unfair* to the party to be estopped." *General Dynamics,* 650 F.Supp. at 1282 (emphasis added). According to the district court in *General Dynamics,* the "fairness" considerations include the following: (a) the ability of the party asserting collateral estoppel to join in the prior action; (2) incentive to litigate in the prior action; (3) any indication that the first court, at least in patent cases, failed to grasp the issues fully; (4) the existence of judgments inconsistent with the prior judgment; and (5) whether the party to be estopped had a "full and fair opportunity to litigate the issue in the prior action." *Id.* at 1282, *citing,* among others, *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 99 S.Ct. 645, 650-51, 58 L.Ed.2d 552 (1979).

POINT 2

LIBERTY MUTUAL IS ESTOPPED FROM CONTRADICTING ITS OWN INTERPRETATION OF THE SUDDEN AND ACCIDENTAL EXCEPTION TO THE POLLUTION EXCLUSION CLAUSE WHICH IT SUBMITTED TO THE COMMISSIONER OF INSURANCE OF THE STATE OF WEST VIRGINIA AND WHICH WAS THEN RELIED UPON BY THE COMMISSIONER IN APPROVING THE LANGUAGE AT ISSUE IN THIS CASE FOR INCLUSION IN INSURANCE POLICIES.

In the instant case, Petitioner is seeking to estop Respondent, Liberty Mutual, from relitigating an issue which Liberty Mutual previously litigated and lost. There is virtually no difference between the language of the Liberty Mutual policy discussed by the Court in *Joy Technologies,* 5-b, and the language of Liberty Mutual's policy in this case. *See* Triangle's *Petition for Writ of Certiorari* at 4-5. The issue in both cases is whether the sudden and accidental exception to the pollution exclusion clause applies when the pollution "damage" is neither expected nor intended, or when the "release" of the pollution is neither expected nor intended.

In *Joy Technologies,* the Court relied on Liberty Mutual's interpretation of the policy language, as adduced from its own internal records and the position it asserted before the Commissioner of Insurance for the State of West Virginia. 12-b.

In one of its own interoffice memoranda, Liberty Mutual described the policy language at issue as follows:

> Coverage for gradual BI [bodily injury] or gradual PD [property damage] resulting over a period of time from exposure to the insured's *waste disposal.* Examples would be gradual adverse effect of smoke, fumes, air or stream pollution, contamination of water supply or vegetation. We are all aware of cases such as contamination of oyster beds, lint in the

> water intake of down stream industrial sites, the Denora Pa. atmospheric contamination, and the like.

11-b (emphasis and brackets in original).

In addition, before the exclusion clause could be legally incorporated into the standard form CGL policy in West Virginia, it had to be approved by the West Virginia Insurance Commissioner. 12-b. In the resulting hearings before the Commissioner of Insurance, Liberty Mutual expressly relied upon the following language of the Insurance Rating Board of the Insurance Service Office of which Liberty Mutual is a member:

> Coverage for pollution or contamination is not provided in most cases under present policies because the *damages* can be said to be *expected* or *intended* and thus are excluded by the definition of occurrence. The above exclusion [the exclusion which is in issue in the present case] clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident . . .

12-b through 13-b (emphasis added, brackets in original). The landmark New Jersey case of *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 218 N.J. Super 516, 534, 528 A.2d 76 (App. Div. 1987) quoted and relied on the very same language in holding that unexpected and unintended pollution damage was covered under an identical CGL policy. *Id.* at 534 (quoted in footnote 1). Based upon this language from the Insurance Rating Board and the extensively cited decisional law, the New Jersey Appellate Division in *Broadwell* held:

> In our view, the pollution exclusion focuses upon the intention, expectation and foresight of the insured. If an insured knows that liability incurred by a foreseeable polluting event is covered by his policy,

> he is tempted to diminish his precautions and relax his vigilance. Conversely, we perceive no sound basis anchored in the policy language which requires prescience or clairvoyance on the part of the insured. Where the insured has taken reasonable precautions against contaminating the environment and the dispersal of pollutants is both accidental and unforeseen, we are of the view that the "sudden and accidental" exception to the exclusion is applicable and the loss is thereby covered by the policy.

Id. at 535.

In *Joy Technologies,* the Court also relied on submissions from the Commissioner of Insurance who presided over the hearings in which Liberty Mutual participated:

> The insurers stated in pre-hearing submissions, at the hearing, and in post-hearing submissions that the proposed endorsement forms did not limit or narrow coverage and were not intended to do so. Based upon those representations, I concluded that the pollution endorsement forms did not narrow or limit coverage and, instead, were mere clarifications of existing coverage as defined and limited by the definition of the term "occurrence." Accordingly, I approved the endorsement forms IRB 335 and MIRB MB G008 submitted respectively by the Insurance Rating Board and the Mutual Insurance Rating Bureau.

13-b (emphasis added).

In the written Order of the Commissioner approving the identical pollution exclusion language at issue in this case, an Order from which no appeal was taken, he stated:

> (1) The said companies and rating organizations have represented to the Insurance Commissioner, orally and in writing, that the proposed exclusions . . . are merely clarifications of existing coverage as

> defined and limited in the definitions of the term "occurrence", contained in the respective policies to which said exclusions would be attached;
>
> (2) To the extent that said exclusions are mere clarifications of existing coverages, the Insurance Commissioner finds that there is no objection to the approval of such exclusions.

14-b. Although this Order is from an administrative agency and not the result of a judicial proceeding, this court has ruled that such an Order is entitled to be accorded preclusive effect. *United States v. Utah Construction & Mining Co.,* 384 U.S. 394, 421-22, 86 S.Ct. 1545, 1559-1560, 16 L.Ed.2d 642 (1966); *United States v. Karlen,* 645 F.2d 635, 638 (8th Cir. 1981); and *The Collateral Estoppel Effect of Administrative Agency Actions in Federal Civil Litigation,* 46 Geo. Wash. L. Rev. 65 (1977). In addition, the decision in *Joy Technologies* is clearly appropriate for the application of offensive collateral estoppel under the *Parklane* doctrine since it was a full adversarial proceeding.

The Court in *Joy Technologies* ultimately determined:

> In view of the fact that in the present case the insurance group representing Liberty Mutual unambiguously and officially represented to the West Virginia Insurance Commission that the exclusion in question did not alter coverage under the policies involved, coverage which included the injuries in the present case, this Court must conclude that the *policies issued by Liberty Mutual covered pollution damage,* even if it resulted over a period of time and was gradual, *so long as it was not expected or intended.*

15-b (emphasis added) (*citing,* among other cases, *Broadwell Realty Services Inc. v. Fidelity & Casualty Co.,* 218 N.J. Super. 516 (App. Div. 1987)).

Liberty Mutual has had ample opportunity to fairly and fully adjudicate the interpretation of the policy language at issue in these cases. It should now be bound by those adjudications. Triangle could not have been made a party to the decision in *Joy Technologies,* so it must endeavor to prevent Liberty Mutual from making a contrary argument in the instant case; Liberty Mutual is also attempting to make a contrary argument in *Morton International Inc. v. General Accident Insurance Co. of America,* Docket No. 34,341 (certif. granted, March 2, 1992). It is likely that petitioners in *Morton,* who are also "insureds" of Liberty Mutual, will also endeavor to offensively collaterally estop Liberty Mutual from succeeding on that issue. Hence, if this Court chooses not to reverse the Fourth Circuit in this matter, it must at least stay the proceedings pending the New Jersey Supreme Court's ruling.

The doctrine of offensive collateral estoppel, as enunciated in *Parklane,* is clearly applicable to Liberty Mutual in this case. When one compares this case with *Parklane* for the purpose of applying the doctrine of offensive collateral, it is evident that: (1) Liberty Mutual stands in the shoes of Parklane; (2) the Commissioner of Insurance for the State of West Virginia stands in the shoes of the SEC; and (3) Triangle stands in the shoes of Shore and the other stockholders. Liberty Mutual is in the same position occupied by Parklane, in that it has had opportunities to litigate the "sudden and accidental" language at issue, both before the Commissioner of Insurance of West Virginia and before the Supreme Court of Appeals of West Virginia in *Joy Technologies.* In addition, the issue is again being litigated, both in this case and before the Supreme Court of New Jersey in *Morton International, Inc. v. General Accident Insurance Co. of America,* Docket No. 34,341 (certif. granted, March 2, 1992).

In order to avoid the inequity of allowing Liberty Mutual to relitigate the "sudden and accidental" language of the pollution exclusion clause, which Liberty

Mutual previously affirmatively stated to the West Virginia Commissioner of Insurance, was to be interpreted to provide coverage in circumstances identical to those presented in this case, this Court should accept jurisdiction over this matter and issue a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit reversing the Circuit Court's ruling under the offensive collateral estoppel doctrine. In the alternative, this Court should issue the Writ and then stay the proceedings pending the decision of the New Jersey Supreme Court in Morton, a decision which will finally and ultimately decide the meaning of "sudden and accidental" under the law of the State of New Jersey, the law which the Supreme Court of Appeals of the State of West Virginia determined should apply in this case.

CONCLUSION

For the reasons set forth above in this Supplemental Brief filed pursuant to *Sup. Ct. R.* 15.7, Petitioners respectfully request this Court to issue a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit in this matter, and to stay the proceedings, pending the decision in Morton.

In the alternative, the Writ should be issued and the decision of the Fourth Circuit reversed because the doctrine of Offensive Collateral Estoppel, as enunciated in *Parklane,* serves to bar Liberty Mutual from relitigating the CGL policy language at issue in this case which has previously been fully and fairly adjudicated before the Commissioner of Insurance of West Virginia and again before the Supreme Court of Appeals of West Virginia in the *Joy Technologies* case.

Respectfully submitted,

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Dated: July 6, 1992

APPENDIX

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 1992 Term

No. 20153

JOY TECHNOLOGIES, INC.,
Plaintiff Below, Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY, ET AL.,
Defendants Below, Appellee

Appeal from the Circuit Court of Mercer County
Honorable John R. Frazier, Judge
Civil Action No. 88-C-96-F

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: January 21, 1992
Filed: June 11, 1992

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JUSTICE BROTHERTON delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "In a case involving the interpretation of an insurance policy, made in one state to be performed in another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary to the public policy of this state." Syllabus, *Liberty Mutual Insurance Company v. Triangle Industries, Inc.*, ____ W.Va. ____, 390 S.E.2d 562 (1990).

2. The public policy of the State of West Virginia is that the law of the State should be administered in such a way as to insure that corporations which seek to do business in West Virginia act in a manner consistent with their studied, unambiguous, official, affirmative representations to the State, its subdivisions, or its regulatory bodies.

Brotherton, Justice:

This is an appeal by Joy Technologies, Inc.,[1] from an order entered by the Circuit Court of Mercer County on June 26, 1990. That order granted Liberty Mutual Insurance Company[2] partial summary judgment in an action brought by Joy Technologies for indemnification for certain pollution claims which had been paid by Joy Technologies. Liberty Mutual had issued commercial general liability policies to Joy Technologies which had obligated it to defend and indemnify Joy for liability claims for personal injury and property damage. It, however, refused to indemnify Joy on the pollution claims involved in the present case on the ground that an exclusion clause contained in certain of its policies excluded coverage for such claims. The circuit court, in

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1. Hereinafter variously also referred to as "Joy Technologies" or "Joy".

2. Also referred to as "Liberty Mutual".

granting Liberty Mutual summary judgment, in essence, found that the exclusion clause precluded coverage for pollution damage unless the pollution was "sudden and accidental." In reaching that conclusion, it appears that the circuit court, relying upon the holding of this Court in *Liberty Mutual Insurance Company v. Triangle Industries, Inc.*, ____ W. Va. ____ , 390 S.E.2d 562 (1990), applied the law of Pennsylvania, which indicates that the exclusion clause in question relieves an insurer of liability unless the pollution was "sudden and accidental."

On appeal, Joy Technologies claims that West Virginia had a more significant relationship with the parties in this case than Pennsylvania and that, under the circumstances, and under the holding in *Liberty Mutual Insurance Company v. Triangle Industries, Inc., Id.*, the law of West Virginia rather than the law of Pennsylvania should have been applied in resolving the issues raised. It also claims that under West Virginia law the exclusion clause should be construed to preclude liability of the insurer only when pollution damage was expected or intended by the insured.

After reviewing the questions presented and the record, this Court agrees with Joy Technologies' assertions. Accordingly, the judgment of the Circuit Court of Mercer County is reversed.

The facts in this case show that Joy Technologies, Inc., is a successor of Joy Manufacturing Company. Joy Manufacturing Company was a Pennsylvania corporation with executive offices in Pennsylvania and with a facility in West Virginia.

In 1968, Joy Technologies, Inc., purchased a manufacturing plant in Bluefield, West Virginia. Joy utilized the facility for cleaning and rebuilding mining machinery. Joy sold the plant in 1980 and moved its operations to Bluefield, Virginia. Joy continues to employ a number of West Virginia residents in its Bluefield, Virginia, operations.

In cleaning and repairing mining machinery at its West Virginia facility, Joy utilized oil containing polychlorinated biphenyls or "PCBs." The same type of oil had been utilized at the facility before Joy purchased it.

In the 1970's, concerns arose over the potential environmental hazards of PCBs, and in the mid-1970's the United States Environmental Protection Agency advised Joy Technologies, Inc., of the concerns. Subsequently, Joy adopted measures to prevent pollution from the PCBs.

In spite of its efforts, in 1985 Joy discovered PCB contamination at the Bluefield, West Virginia, site and on neighboring property. Joy notified the Environmental Protection Agency and negotiated an order with the Agency to remediate the contamination. Pursuant to the order, Joy eliminated the pollution at a cost of over $6,000,000.

Additionally, after the pollution was discovered, owners of property adjoining the Bluefield site filed suit against Joy for property damage, and the individual who had purchased the Bluefield site from Joy, Elwin Aliff, brought an action claiming that the PCB contamination had diminished the value of the property. Personal injury claims were also asserted by employees, former employees, and their spouses who alleged that they had suffered bodily injuries as a result of exposure to PCBs and other substances.

From 1944 until January 1, 1978, Liberty Mutual Insurance Company, a Massachusetts corporation with its principal place of business in Massachusetts, issued commercial general liability policies to Joy. The policies obligated Liberty Mutual to defend and indemnify Joy for liability claims based on personal injury or property damage arising out of an "occurrence." The policies defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

The policies which Liberty Mutual issued to Joy Technologies beginning in 1972 contained an exclusion clause. The exclusion clause provided that coverage did not extend:

> [T]o bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.[3]

After the various claims mentioned above arose against Joy Technologies as a result of the pollution of the Bluefield, West Virginia, facility, Liberty Mutual Insurance Company, taking the position that the exclusion clause contained in the policies issued after 1971 relieved it of liability, refused to indemnify and defend Joy as was generally required on the policies which it had issued to Joy. Joy, therefore, instituted this action for

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3. In the record of the present appeal a copy of only one policy has been submitted to this Court. That policy bore an expiration dated of October 1, 1974. In addition to the language quoted in the body of the opinion, the 1974 policy submitted to the Court contains another "Contamination or Pollution Exclusion" which has somewhat different language. The page containing that additional clause does not state an effective date or an expiration date, and it is not clear to the Court whether it was actually a part of the policy issued to Joy Technologies.

Both Joy Technologies and Liberty Mutual, in their briefs, identify the language quoted in the opinion as constituting the exclusion in issue in this case. The same language was also submitted to the West Virginia Insurance Commissioner in 1970 for his consideration and approved as hereinafter discussed.

Given the nature of the record and the representations of the parties in their briefs, this Court has based its conclusions on the clause quoted in the body of the opinion rather than on the additional "Contamination or Pollution Exclusion" submitted in the record.

breach of contract and for a declaratory judgment that it is entitled to defense and idemnity for personal injury and property liability arising out of the pollution at the Bluefield facility.

After the filing of Joy's complaint, Liberty Mutual moved for summary judgment on the claims arising after 1971 at the Bluefield, West Virginia, facility on the basis of the exclusion clause contained in the policies issued to Joy after 1971. Liberty Mutual took the position that since the pollution was not "sudden and accidental," the exclusion clause barred it of liability for the years that its policies contained the clause. In support of the motion, Liberty Mutual introduced depositions taken in an underlying personal injury and property damage case brought against Joy Technologies, Inc. The evidence from that case showed that Joy rebuilt motors used in mining equipment at the Bluefield, West Virginia, facility. The rebuilding of the motors required the emptying of PCB contaminated oil. In emptying the motors, the oil was drained into five-gallon buckets. From 1968 until 1972 or 1973, Joy's employees regularly disposed of the oil by dumping it down a storm drain outside the AC motor room at the facility, by dumping it into a gravel parking lot, or by dumping it on a hill or bank at the site. There was also evidence that PCB-contaminated oil was routinely spattered inside the building where the motors were rebuilt, that the oil was everywhere, and that there were puddles of it on the floor. At times, buckets of the oil were knocked over by forklifts and spilled. The testimony also indicated that spills occurred on a regular basis. Liberty Mutual essentially argued that this evidence showed that the pollution was not "sudden and accidental" and that coverage for it was excluded by the exclusion clause.

At the submission of briefs and oral arguments, the Circuit Court of Mercer County granted Liberty Mutual's motion for summary judgment. In so doing, the Court apparently concluded that under *Liberty Mutual Insurance Company v. Triangle Industries, Inc., Id.*,

Pennsylvania law governed the interpretation of the exclusion clause in the policies issued by Liberty Mutual in 1972 and the following years. Further, under Pennsylvania law the exclusion clause precluded coverage for claims arising out of pollution at the Bluefield facility for the period Liberty Mutual's policies contained the clause. On June 26, 1990, the circuit court issued a written order formally embodying its conclusions. It is from that order that Joy Technologies, Inc., now appeals.

On appeal, Joy Technologies first asserts that West Virginia had a more significant relationship with the parties in the case than Pennsylvania and that, under the circumstances, the circuit court should have applied the law of West Virginia rather than the law of Pennsylvania in resolving the issues presented.

The question of whether West Virginia law of Pennsylvania law applies in this case is somewhat critical since Pennsylvania has carefully examined the exclusion clause in issue in the present case and has concluded that it is unambiguous and that its clear and plain meaning is to exclude coverage for intentional pollution and for unintentional pollution resulting from a release or dispersal that occurs gradually over time. *Lower Paxton Township v. United States Fidelity & Guaranty Company,* 383 Pa.Super. 558, 557 A.2d 393 (1989). *See also, United States Fidelity & Guaranty Company v. The Korman Corp.,* 693 F.Supp. 253 (E.D.Pa. 1988), *Fisher & Porter Company v. Liberty Mutual Insurance Company,* 656 F.Supp. 132, (E.D.Pa. 1986); *Techalloy Company, Inc. v. Reliance Insurance Company,* 338 Pa. Super. 1, 487 A.2d 820 (1984).

In *Liberty Mutual Insurance Company v. Triangle Industries, Inc., Supra,* this Court addressed the question of what law should be applied in interpreting an insurance policy. In the sole syllabus in that case, the Court ruled that:

> In a case involving the interpretation of an insurance policy, made in one state to be performed in

another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary to the public policy of this state.

In adopting the rule in the *Triangle Industries* case which favors the application of the law of the forum in which formation of the contract occurs, the Court recognized that "certainly, predictability and uniformity of result" were desirable in contract negotiations and application. The Court did not, however, preclude the application of the law of another state where the other state has a more significant relationship to the transaction and the parties, or where the law of the state of formation is contrary to the public policy of the other state.

The action in the present case arises out of the expenditures of monies for remediating damage caused by pollution to property in West Virginia, and it is rather clear that the pollution arose from operations which were conducted in West Virginia and involved a facility located in West Virginia. Thus, the injury occurred in West Virginia, the instrumentality of injury was located in West Virginia, and the forum selected to try the issues was West Virginia. These factors suggest that West Virginia has had a very significant relationship to the transaction and the parties. In fact, the relationship would appear to be more substantial than that of Pennsylvania, where the contract was formed.

In a very recent case, similar to the one now before the Court, the New Jersey Superior Court, Appellate Division, concluded that contacts similar to those in the present case were alone sufficient to justify the application of the law of the forum rather than the law of the jurisdiction where the contract was entered into. In that case, *Gilbert Spruance Co. v. Pennsylvania Manufacturers' Ass'n Ins. Co.,* No. A-1975-90T5 (N.J.Super. App.Div. Feb. 14, 1992), the New Jersey Court stated:

> We hold that New Jersey courts should interpret according to New Jersey law a pollution exclusion clause contained in a comprehensive general liability insurance policy, wherever written, which was purchased to cover an operation or activity, wherever its principal location, which generates toxic wastes that predictably come to rest in New Jersey and impose legal liabilities there on the insured. In such a case, New Jersey has the dominant and significant relationship with the parties, the transaction, and the outcome of the controversy.

slip op. at 10.

However, as indicated in *Liberty Mutual Insurance Company v. Triangle Industries, supra,* a further substantial factor which might militate against the application of the law of the state of contract formation is the public policy of the state of litigation.

Certainly, in this Court's view, an essential part of the public policy of the State of West Virginia is that the law of the State should be administered in such a way as to insure that foreign corporations which seek to do business in West Virginia act in a manner consistent with their studied, unambiguous, official, affirmative representations to the State, its subdivisions, or its regulatory bodies.

As will hereinafter be discussed, this Court believes that Liberty Mutual Insurance Company, in studied, affirmative and official communications with a regulatory authority of the State of West Virginia, prior to the institution of this action, took the position that the exclusion in question in the present case would have a meaning and effect different from that attributed to it by the State of Pennsylvania. In view of this, if this Court held that Pennsylvania law applied to the questions in issue, it would allow Liberty Mutual Insurance Company to take a position, and act in a manner, inconsistent with Liberty Mutual's studied, unambiguous, official and affirmative representations. Such, in this Court's

view, would be inconsistent with, and contrary to, the public policy of this State.

Under the circumstances, the Court believes that in spite of the general policy of the law favoring the application of the law of a state where a contract is formed, the Court, in line with the overall holding in the syllabus of *Liberty Mutual Insurance Company v. Triangle Industries, Inc., supra,* believes that the law of West Virginia, rather than the law of Pennsylvania, should govern the resolution of the questions involved in the present case.

The question which the Court must now address is what is the legal effect in West Virginia of the exclusion in question in the policies issued by Liberty Mutual Insurance Company. Before this question is addressed, however, certain observations should be made regarding the basic coverage language of the general commercial liability policy.

> The basic language of the policy states:
>
> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> Coverage A. bodily injury or
> Coverage B. property damage
>
> to which this policy applies, caused by an occurrence . . .

An occurrence is defined as:

> "occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured;

Thus, under the basic policy issued by Liberty Mutual Insurance Company, Liberty Mutual obligated itself to defend and indemnify Joy Technologies for liability claims based on personal injury or property

damage arising out of a "occurrence," and an "occurrence" was defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

The record shows at the time Liberty Mutual adopted this standard form for the commercial general liability policy, a memorandum entitled "Summary of Broadened Coverage Under New GL Policies With Necessary Limitations to Make This Broadening Possible," was circulated internally within the company. That memorandum indicated that the policies covered liabilities including:

> Coverage for gradual BI [bodily injury] or gradual PD [property damage] resulting over a period of time from exposure to the insured's *waste disposal*. Examples would be gradual adverse effect of smoke, fumes, air or stream pollution, contamination of water supply or vegetation. We are all aware of cases such as contamination of oyster beds, lint in the water intake of down stream industrial sites, the Donora Pa. atmospheric contamination, and the like.

In interpreting the basic policy, courts have uniformly indicated that the language generally covers claims arising from pollution. However, because of the "expected" and "intended" language, intentional pollution claims are not covered. The fact that pollution has occurred over a period of time, in the absence of an element of intention or expectation, has not been held to preclude coverage under the basic language. *See Liberty Mutual Insurance Company v. SCA Service, Inc.,* No. 88-6575 (Mass.Super., October 12, 1989); *Kipin Industries, Inc. v. American Universal Insurance Company,* 41 Ohio App.3d 228, 535 N.E.2d 334 (1987).

In the present case there were no facts elicited which demonstrate that Joy Technologies at any level intended at any time to harm property, persons, or

environment in conducting its business. In fact, certain depositions indicate that the disposal practices used by Joy, and which were ultimately found to have caused pollution, were commonly accepted in the industry at the time. When Joy acquired knowledge of possible harm from the practices, it changes those practices.

In this Court's view, the evidence adduced does not support the conclusion that Joy Technologies expected or intended to do harm when it dumped and negligently allowed the spilling of oils contains PCBs at the Bluefield site.

Given all these circumstances, the question in the present case is ultimately whether the exclusion clause contained in the policies issued by Liberty Mutual to Joy Technologies in 1972, and on later dates, effectively excluded indemnification for the damage which resulted at the Bluefield facility.

Before the exclusion clause could be legally incorporated into the commercial general liability policy in West Virginia, it was necessary that Liberty Mutual obtain the approval of the West Virginia Insurance Commissioner. Before incorporating the exclusion clause, in accordance with West Virginia law, Liberty Mutual submitted the exclusion language to the West Virginia Insurance Commissioner for his approval.

The West Virginia Insurance Commissioner held hearings to consider the proposed exclusionary language. The record shows that, in conjunction with the submissions, the Insurance Rating Board and apparently also the Mutual Insurance Rating Board, acting on behalf of their members and subscribers, including Liberty Mutual, included with their submission of the proposed exclusion language an explanation which stated:

> Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended

> and thus are excluded by the definition of occurrence. The above exclusion [the exclusion which is in issue in the present case] clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident . . .

In this Court's view, the insurance industry thus represented to the State of West Virginia, acting through the West Virginia Commissioner of Insurance, that the exclusion which is in issue in the present case merely clarified the pre-existing "occurrence" clause.

This conclusion is further supported by an affidavit submitted by the former West Virginia Insurance Commissioner, who officially authorized the inclusion of the exclusion in West Virginia policies. That affidavit stated that "in preliminary submissions on the matter, the insurers represented that the proposed forms did not limit and were not intended to limit the coverage." The Commissioner also said in the affidavit that:

> The insurers stated in pre-hearing submissions, at the hearing, and in post-hearing submissions that the proposed endorsement forms did not limit or narrow coverage and were not intended to do so. Based upon those representations. I concluded that the pollution endorsement forms did not narrow or limit coverage and, instead, were mere clarifications of existing coverage as defined and limited by the definition of the term "occurrence." Accordingly, I approved the endorsement forms IRB 335 and MIRB MB G008 submitted respectively by the Insurance Rating Board and the Mutual Insurance Rating Bureau.

In the written order approving the pollution exclusion, the West Virginia Insurance Commissioner stated:

> (1) The said companies and rating organizations have represented to the Insurance Commissioner, orally and in writing, that the proposed exclusions . . . are merely clarifications of existing coverage as defined and limited in the definitions of the term "occurrence", contained in the respective policies to which said exclusions would be attached:
>
> (2) To the extent that said exclusions are mere clarifications of existing coverages, the Insurance Commissioner finds that there is no objection to the approval of such exclusions;

In this Court's view, it appears clear from the foregoing discussion that the 1966 commercial general liability insurance policies, as originally issued, covered gradual bodily injury and gradual property damage resulting over a period of time from exposure to the insured's waste disposal, as was suggested by Mr. Bean in the memorandum issued in conjunction with the drafting of the policies. They, however, as originally issued, excluded damage resulting from expected and intended pollution, as indicated by the Insurance Rating Board and the Mutual Insurance Rating Board in their 1970 filings with the West Virginia State Insurance Commissioner. Further, from the filings it is clear that in seeking approval of the exclusion provision, the insurance companies did not represent that they intended to exclude any risk which was not excluded in the original policies, but that they merely intended to clarify what had been excluded in the original policies. In approving the new policy language, the West Virginia Insurance Commissioner specifically stated that the companies and rating organizations had represented that the proposed exclusions were mere clarifications of existing coverage, and in approving the language the Insurance Commissioner approved it only "to the extent that said exclusions are mere clarifications of existing coverages."

This Court has recognized that where a definite meaning has been ascribed to language used in an

insurance policy, that meaning should be given to the language by the courts. *Christopher v. United States Life Insurance Company in City of New York*, 145 W.Va. 707, 116 S.E.2d 864 (1960). In view of this, and in view of the fact that in the present case the insurance group representing Liberty Mutual unambiguously and officially represented to the West Virginia Insurance Commission that the exclusion in question did not alter coverage under the policies involved, coverage which included the injuries in the present case, this Court must conclude that the policies issued by Liberty Mutual covered pollution damage, even if it resulted over a period of time and was gradual, so long as it was not expected or intended.[4]

The evidence in the present case shows that Joy Technologies neither expected nor intended the pollution damage which occurred in the present case.

The judgment of the Circuit Court of Mercer County is, therefore, reversed, and this case is remanded for determination of the amount of damages to which Joy Technologies, Inc., is entitled.

Reversed and remanded with directions.

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4. The Court notes that a number of other courts have concluded that the so-called "exclusion policy" involved in the present case merely clarified the coverage provided under the definition of insurance in the 1966 commercial general liability policy. *See Claussen v. Aetna Casualty & Surety Co.*, 259 Ga. 333, 380 S.E.2d 686 (1989); *United States Fidelity & Guaranty Co. v. Specialty Coatings Co.*, 188 Ill.App.3d 378, 129 Ill.Dec. 306, 535 N.E.2d 1071 (1989); *Broadwell Realty Services, Inc. v. Fidelity & Casualty Co.*, 218 N.J.Super. 516, 528 A.2d 76 (1987).